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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MARCEL POWERS,

Defendant and Appellant.

A153361

(Napa County
Super. Ct. No. CR182618)

In re ANTHONY MARCEL POWERS,
on Habeas Corpus.

A155225

Anthony Powers has filed an appeal and petition for writ of habeas corpus challenging his conviction based on a plea of no contest to identity theft and possessing a controlled substance. He asserts the identity theft charge should have been reclassified as misdemeanor shoplifting pursuant to Penal Code section 459.5;¹ his plea was involuntary because his lawyer failed to advise him the charge could be reclassified; and that her failure to properly advise him, seek reclassification, or move to withdraw his plea as involuntarily made was ineffective assistance of counsel. In a related “application for relief from the certificate of probable cause requirement,” Powers asserts his lawyer’s failure to request a certificate of probable cause to appeal was also ineffective assistance of counsel.

¹ Unless otherwise noted, further statutory citations are to the Penal Code.

We deny the application for relief from the requirement that Powers obtain a certificate of probable cause. Because Powers failed to obtain a certificate of probable cause, his attack on the validity of his plea is not cognizable on this appeal or through his petition for writ of habeas corpus. Accordingly, we dismiss the appeal and deny the petition for writ of habeas corpus.

BACKGROUND

On October 26, 2016, Powers's car was pulled over by American Canyon police when he failed to proceed through an intersection after the light changed to green. He appeared to be inebriated, his license was suspended or revoked, and his wallet contained numerous identification cards, drivers' licenses, and credit cards belonging to six different individuals. One of those individuals later told police that one credit card found in Powers's possession had been stolen and used at a Kentucky Fried Chicken near the scene of the theft. A baggy containing methamphetamine, a glass smoking pipe and an open bottle of vodka were found in the car. Powers had a 30-year criminal history, was on probation in Solano and Sacramento counties, and would possibly serve a lengthy sentence in his Sacramento cases.

The Napa County district attorney charged Powers with one count of felony identity theft (§ 530.5, subd. (a)), six counts of misdemeanor identifying information theft (§ 530.5, subd.(c)(1)), possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), possession of an injection/ingestion device (Health & Saf. Code, § 11364, subd. (a), and driving with a suspended or revoked license (Veh. Code, § 14601.1, subd. (a)). The complaint alleged a prior serious or violent felony conviction pursuant to section 667, subdivisions (b) through (i).

On April 27, 2017, pursuant to a negotiated disposition, Powers entered a no contest plea to identity theft and possession of a controlled substance, admitted the prior conviction allegation, and was immediately released on his own recognizance pending sentencing. The plea bargain contemplated a two-year prison sentence, to be increased to six years if Powers failed to appear or committed any new offense.

On May 30, Powers failed to appear for sentencing. The court revoked his own-recognizance release and issued a bench warrant.

On November 1, 2017, Powers moved to withdraw his plea. He asserted his plea was involuntary because he had cancer and was on pain medication at the time, did not appreciate the risk of a six-year sentence, entered the plea against his attorney's advice, and "[t]he prospect of immediate release and influence of pain medication overcame the exercise of my free judgment." On January 3, 2018, Powers withdrew the motion. He was sentenced in accord with the plea agreement to six years in prison, consisting of the aggravated three-year term for identity theft doubled due to the prior strike conviction, plus a concurrent 100 days for the controlled substance misdemeanor.

On January 8, 2018, Powers filed a timely notice of appeal "based on the sentence or other matters occurring after the plea that do not affect the validity of the plea." On June 21, 2018, with his opening brief on appeal, he applied in this court for relief from the certificate of probable cause requirement "to enable him to challenge the constitutional validity of his plea and his counsel's ineffective assistance prior thereto in this pending appeal[.]" On September 5, 2018, Powers filed a petition for writ of habeas corpus in this court. We consolidated the petition with Powers's appeal² and directed the Attorney General to furnish an informal response.

DISCUSSION

The pertinent legal context for the premise of Powers's claims on the merits is summarized in *People v. Jimenez* (2018) 22 Cal.App.5th 1282, review granted July 25, 2018, S249397 (*Jimenez*) as follows. "On November 4, 2014, California voters enacted Proposition 47, 'The Safe Neighborhoods and Schools Act,' which became effective the next day. [Citation.] Proposition 47 reduced certain theft-related offenses from felonies or wobblers to misdemeanors, unless the offenses were committed by certain ineligible offenders. [Citation.] Under Proposition 47, a defendant may be eligible for misdemeanor resentencing or redesignation under section 1170.18 if he or she would

² Because we consolidated the two proceedings, Petitioner's request for judicial notice of the appellate records and briefs is denied as moot.

have been guilty of a misdemeanor under Proposition 47” (*Id.* at pp. 1286-1287.) “Proposition 47 added several new provisions, including section 459.5, which created the crime of shoplifting. Section 459.5, subdivision (a) provides: ‘Notwithstanding [s]ection 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary.’ ‘Shoplifting is punishable as a misdemeanor unless the defendant has previously been convicted of a specified offense.’ [Citations.] Section 459.5, subdivision (b) explicitly limits charging with respect to shoplifting: ‘ “Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.” ’ ” (*Id.* at pp. 1287-1288, citing *People v. Gonzales* (2017) 2 Cal.5th 858, 863 (*Gonzales*).)

Powers asserts Proposition 47 precluded the district attorney from charging him with identity theft based on his use of one of the stolen credit cards. He further asserts his lawyer provided constitutionally ineffective assistance when she failed to advise him about Proposition 47, move to reclassify the identity theft charge to misdemeanor shoplifting under section 459.5, or move to withdraw his plea as based on inadequate advisements. (See *Gonzales, supra*, 2 Cal.5th at pp. 876-877; see also *People v. Chatman* (2019) 33 Cal.App.5th 60 [petn. for review filed April 18, 2019].) Appeal of these claims was forfeited by Powers’s failure to obtain a certificate of probable cause.

Under section 1237.5, with exceptions that do not apply here a defendant may not appeal from a judgment of conviction upon a guilty or no contest plea unless he or she has obtained from the trial court a certificate of probable cause based on a showing of reasonable constitutional, jurisdictional, or other grounds for appeal going to the legality of the proceedings. (*People v. Johnson* (2009) 47 Cal.4th 668, 676-677 [certificate of probable cause required for appeal premised on claim of ineffective assistance of trial counsel at motion to withdraw plea].) If a defendant who pled guilty or no contest

challenges the validity of the plea on appeal without having obtained a certificate of probable cause, we may not proceed to the merits of the appeal but must instead order its dismissal. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1096 (*Mendez*); Cal. Rules of Court, rule 8.304(b).) Moreover, “[a] defendant who challenges the validity of such a plea on the ground that trial counsel rendered ineffective assistance in advice regarding the plea may not circumvent the requirements of section 1237.5 by seeking a writ of habeas corpus.” (*In re Chavez* (2003) 30 Cal.4th 643, 651 (*Chavez*).)

In *Mendez* the Supreme Court considered whether to require strict compliance with section 1237.5. The court noted that some appellate courts had chosen to apply the rules in a relaxed manner for reasons of judicial efficiency, on the assumption that a defendant who failed to obtain review was “likely to come before it again by means of petition for writ of habeas corpus or otherwise.” (*Mendez, supra*, 19 Cal.4th at pp. 1097-1098.) The Court rejected this approach and held that section 1237.5 and rule 8.304(b) [former rule 31(d)] require strict application. Section 1237.5 “is a general ‘legislative command’ to defendants. [Citation.] It is not an authorization for ‘ad hoc dispensations’ from such commands by courts. [Citation.] Indeed, it effectively precludes dispensations of this sort, which are ‘squarely contrary’ to its terms.’ ” (*Id.* at p. 1098.)

Here, Powers did not request or obtain a certificate of probable cause to challenge the validity of his plea.³ Powers contends this failure should be excused under the doctrine of constructive filing because his trial counsel was ineffective in failing to request a certificate of probable cause identifying as a reasonable ground for appeal her alleged pre-plea failures to assert reduction of the identity theft charge under Proposition 47. Heeding *Mendez*’s clear directive, we agree with those courts that have concluded

³ With the “application for relief from the certificate of probable cause requirement” filed in this court on June 21, 2018, Powers provided an undated amended notice of appeal and request for a certificate of probable cause purportedly rejected by the trial court as untimely on June 12, 2018, more than six months after sentencing. The documents bear no indication they were submitted to the trial court, are not part of the record in the appeal or habeas proceeding, are not subject to judicial notice, and are in any event untimely. (See Evid. Code, §§ 451, 452, 459; Cal. Rules of Court, rules 8.304(b)(1), 8.308(a).)

such a claim is not cognizable on appeal because defendants could routinely make such claims of ineffective assistance and thereby effectively nullify section 1237.5. (See *People v. Manriquez* (1993) 18 Cal.App.4th 1167, 1170-1171 (*Manriquez*); see also *People v. Breckenridge* (1992) 5 Cal.App.4th 1096, 1100-1101, disapproved on another point in *Chavez, supra*, 30 Cal.4th at p. 657, fn. 6; see also *People v. Zamora* (1991) 230 Cal.App.3d 1627, 1633-1634.) As observed in *People v. Manriquez, supra*, 18 Cal.App.4th at p. 1171, “[f]rom time to time, perhaps more or less wisely, courts proceed to the merits of a purported appeal simply to discourage any subsequent petition for habeas corpus based upon ineffective assistance of counsel, *especially if counsel can be blamed for failing to obtain the certificate or the appellate issue goes to the competence of trial counsel*. [Citations.] We resist the temptation to do so.” (Italics added.) We follow suit. Powers’s claim of ineffective assistance is not properly before us.⁴

There is a further reason Powers’s ineffective assistance claim does not surmount the lack of a certificate of probable cause. “A claim on appeal of ineffective assistance of counsel must be rejected ‘ “[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” ’ [Citations.] Unless the record affirmatively discloses that counsel had no tactical purpose for his act or omission, ‘the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence dehors the record may be taken to determine the basis, if any, for counsel’s conduct or omission.’ ” (*People v. Hinds* (2003) 108 Cal.App.4th 897, 901.)

We do not know why Powers’ attorney did not seek a certificate of probable cause, but there could have been various reasons. First, counsel could have had a valid tactical reason not to seek reclassification under section 495.5. The record indicates

⁴ The consolidated habeas petition is addressed solely to trial counsel’s purported failures to advise Powers about Proposition 47, seek reclassification, or move to withdraw his plea. It does not include a claim that the failure to seek a certificate of probable cause was also ineffective assistance of counsel.

Powers may have wanted to take the prosecutor's offer, even against the advice of counsel, because his overriding objective was his immediate release from custody to deal with medical issues pending sentencing in this and his other cases. Defense counsel could therefore have refrained from moving to reduce the identity theft charge because doing so could jeopardize or delay the plea negotiations, against her client's wishes. (See *Florida v. Nixon* (2004) 543 U.S. 175, 187 [the client, not the attorney, has the ultimate authority to decide whether to plead].) If so, there was no basis to assert that trial counsel's performance was constitutionally ineffective, and, by the same token, no grounds for a certificate of probable cause to appeal on that basis.

Alternatively, trial counsel could have reasonably concluded it was against Powers's best interests to challenge the plea agreement on appeal because reversal could expose him to harsher punishment than the negotiated disposition. Powers was charged with nine misdemeanors carrying the potential for eight years' incarceration, for a potential maximum term of eight and one half years if the felony charge were ultimately reduced to misdemeanor shoplifting and 14 years if it remained a felony. The negotiated plea thus guaranteed him a shorter sentence than the potential maximum term he faced whether or not the felony were reduced to a misdemeanor—an outcome that remains uncertain pending Supreme Court consideration of Proposition 47's application to identity theft.⁵ (See generally *People v. Erdelen* (1996) 46 Cal.App.4th 86 [unlimited consecutive sentencing for misdemeanor sentences].) A successful appellate challenge to the plea bargain following the issuance of a certificate of probable cause would return the parties to the status quo ante, eliminating the guaranteed shorter sentence and exposing

⁵ Conflicting opinions addressing section 459.5, subdivision (a)'s application to identity theft are currently pending before the Supreme Court. (Compare *People v. Sanders* (2018) 22 Cal.App.5th 397, review granted July 25, 2018, S248775, *People v. Liu* (2018) 21 Cal.App.5th 143, review granted June 13, 2018, S248130, and *People v. Weir* (2019) 33 Cal.App.5th 868 [petition for review filed April 15, 2019 and April 30, 2019] with *People v. Brayton* (2018) 25 Cal.App.5th 734, review granted October 10, 2018, S251122, and *People v. Jimenez* (2018) 22 Cal.App.5th 1282, review granted July 25, 2018, S249397.)

Powers to the risk of a longer sentence. Competent trial counsel could reasonably decide not to take that chance.

On this record we cannot say there could be no valid reason for defense counsel to refrain from seeking a certificate of probable cause.

DISPOSITION

The appeal is dismissed. The petition for writ of habeas corpus and application for relief from the certificate of probable cause requirement are denied.

Siggins, P.J.

WE CONCUR:

Fujisaki, J.

Petrou, J.

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